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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1749~~ 70-206

ALVIN HARRISON PETERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on the 18th day of January, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is presently unreported. The memo opinion entered on the 18th day of January, 1971 is attached hereto as Exhibit "A" and appears as part of the transcript of record. There is no reported opinion from the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on January 18, 1971. A petition for rehearing was filed by petitioner and on the 22nd day of March, 1971 the petition for rehearing was denied by the Circuit Court of Appeals for the Ninth Circuit. The jurisdiction of this court is invoked under 28 USC 1254(1). This court on the 17th day of April, 1971 entered an Order Extending Time To File Petition For Writ Of Certiorari to and including the 21st day of May, 1971.

QUESTIONS PRESENTED

1. Whether the statutory presumption contained in 21 USC Section 174 permitting a trial judge to instruct a jury that heroin found in an accused possession imputes the knowledge to the accused that said drug was illegally imported and was known by the accused to be illegally imported is violative of the accused rights under the Sixth and Fourteenth Amendments.

2. Whether the statutory presumption authorized under 26 USC Section 4704(a) stating the absence of appropriate tax stamps on narcotic drugs shall be *prima facie* evidence of a violation of said statute is violative of accused Sixth and Fourteenth Amendment rights as applied to the narcotic drug heroin.

3. Whether the statutory presumption authorized under 26 USC Section 4704(a) stating the absence of appropriate tax stamps on narcotic drugs shall be *prima facie* evidence of a violation of said statute is violative of accused Sixth and Fourteenth Amendment rights as applied to the narcotic drug cocaine.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution, 21 USC Section 174, and 26 USC Section 4704(a).

STATEMENT

On June 10, 1969, the petitioner Alvin Harrison Peterson was indicted by a Federal Grand Jury in the United States District Court, Western District of Washington, Northern Division, the indictment charging in four counts, all involving the date February 26, 1969, Counts I and III charging a violation of Title 21 USC Section 174 and Counts II and IV pertaining to violations of Title 26 USC Section 4704(a).

The indictment reads as follows:

COUNT I

"That on or about February 26, 1969, at Seattle, within the Western District of Washington, Northern Division, ALVIN HARRISON PETERSON did knowingly sell a quantity of narcotic drugs to Federal Narcotics Agent Joel H. Shapiro, to wit: approximately 3.271 grams of heroin hydrochloride after the same had been imported and brought into the United States contrary to law and knowing the same had been imported and brought into the United States contrary to law.

"All in violation of Title 21 USC Section 174."

COUNT II

"That on or about February 26, 1969, at Seattle, within the Western District of Washington, Northern Division, ALVIN HARRISON PETERSON did unlawfully sell, dispense and distribute a quantity of narcotic drugs to Federal Narcotics Agent Joel H. Shapiro, to wit: approximately 2.271 grams of heroin

hydrochloride, which narcotics drugs were not in the original stamped package or from the original stamped package.

"All in violation of Title 26 USC Section 4704(a)"

COUNT III

"That on or about February 26, 1969, at Seattle, within the Western District of Washington, Northern Division, ALVIN HARRISON PETERSON did knowingly sell a quantity of narcotic drugs to Federal Narcotics Agent Joel H. Shapiro, to wit: approximately 7.126 grams of cocaine hydrochloride, after the same had been imported and brought into the United States contrary to law and knowing the same had been imported and brought into the United States contrary to law.

"All in violation of Title 21 USC Section 174."

COUNT IV

"That on or about February 26, 1969, at Seattle, within the Western District of Washington, Northern Division, ALVIN HARRISON PETERSON did unlawfully sell, dispense and distribute a quantity of narcotic drugs to Federal Narcotics Agent Joel H. Shapiro to wit: approximately 7.126 grams of cocaine hydrochloride which narcotics drugs were not in the original stamped package or from the original stamped package.

"All in violation of Title 26 USC Section 4704(a)"

The petitioner was arraigned and entered a plea of not guilty to all four counts to this indictment, and the petitioner's case came on for trial before a jury in the court of the Honorable William J. Lindberg, United States District Judge, on January 5, 1970 (Tr. 1).

At the conclusion of the testimony, the petitioner moved for a dismissal of Count III of the indictment (Tr. 88) and after argument of counsel the court granted the motion to dismiss Count III (Tr. 91).

In the court's instructions to the jury, the court instructed the jury as follows as to Counts II and IV of the indictment:

> "Coming now to the tax count, namely the offenses charged in Counts II and IV of the indictment, they are, in substance, that the defendant did unlawfully sell, dispense and distribute quantities of heroin hydrochloride in Court II and cocaine hydrochloride in Count IV.
>
> "Let me start that over.
>
> "Counts II and IV of the indictment charge that the defendant did sell, dispense and distribute quantities of heroin hydrochloride and cocaine hydrochloride to the narcotics agent, Mr. Shapiro, and that such distribution was unlawful by reason of the fact that the heroin and the cocaine was not then and there either in the original stamped package bearing the revenue tax-paid stamps or from an original stamped package bearing the tax-paid revenue stamps which are required by law under Title 26 Section 4704(a).
>
> "That particular section, so far as it is applicable, reads as follows:
>
> "'It shall be unlawful for any person to sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package and the absence of appropriate tax-paid stamps on narcotic drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession the same may be found.'
>
> "As to Counts II and IV, two essential elements are required to be proved beyond all reasonable doubt in order to establish the offense charged in said counts:
>
> "First, that the act or acts of distributing the narcotic drugs alleged were not in or from an original stamped package bearing the revenue stamps required by law as charged—were not in or from—and, second, doing such act or acts knowingly.

"As stated before, the burden is always upon the government to prove beyond a reasonable doubt every essential element of the crime charged and the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

"I have used the words, with respect to the essential elements, that in all the counts charged the act must be knowingly done.

"Now, an act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

"The purpose of adding the word 'knowingly' is to assure that no one would be convicted for an act done because of mistake, accident or other innocent reason.

"As I have indicated to you and in some respects I have outlined with respect to Count I, the statute involved here provides that the absence of appropriate tax-paid stamps shall be prima facie evidence of the violation by the person in whose possession the narcotic drug may be found.

"Prima facie evidence of a violation means such evidence as would warrant a verdict of guilty unless overcome or outweighed by other evidence in the case. That is to say, unless the evidence in the case leads the jury to a different or contrary conclusion.

"Again, this statute does not change the fundamental rule that the defendant is presumed innocent until proved guilty beyond a reasonable doubt, nor does it impose upon the accused the burden or duty to produce proof that the narcotic drug was paid as required by law or any other evidence. As previously stated, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged and the law never imposes upon a defendant in a criminal case the burden or duty of producing or calling any witnesses or producing any evidence.

"What the statute means is that upon a trial a violation thereof, if the jury should find beyond

a reasonable doubt from the evidence in the case that the accused had possession of a narcotic drug not bearing the tax-paid revenue stamps required by law, as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the narcotic drug was distributed in or from an unstamped package as charged and to draw further inference and find that the accused had knowledge that the narcotic drug was distributed in or from a package not bearing the tax-paid revenue stamps required by law as charged.

"In connection with any explanation offered for possession of the narcotic drug, you are reminded in the exercise of constitutional rights and accused need not testify. Possession may be satisfactorily explained by facts and circumstances in evidence independent of any testimony or other evidence of the accused.

"The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

"If the evidence in the case is such as to satisfy the jury that any possession the accused may have had of a narcotic drug involved in this case was innocent, or if the evidence in the case leaves the jury with a reasonable doubt whether such possession was innocent, then the jury should acquit the defendant."

On January 6, 1970 the jury returned a verdict of guilty against the petitioner on Counts I, II and IV as charged in the indictment (Tr. 130).

On January 16, 1970 the Honorable William J. Lindberg United States District Judge sentenced petitioner to eight (8) years in prison on Count I, five (5) years in prison on Count II, and five (5) years in prison on Count IV, with the sentences on Count II and IV to run concurrently with the sentence imposed on Count I.

On January 16, 1970 petitioner filed his notice of appeal to the Ninth Circuit Court of Appeals. That court on January 18, 1971 affirmed the decision of the District Court. Motion for rehearing was denied on March 22, 1971 and this appeal follows:

REASONS FOR GRANTING WRIT

1. The first question presented involves an important development in Federal Criminal law. The issue has not been considered by the United States Supreme Court although the problem was touched upon in the case of *Turner v. United States,* 396 U.S. 398, 24 L.Ed.2d 610, 90 S. Ct. 642 (1970). The question presented for review under Count I is whether the statutory presumption contained in 21 USC Section 174 permitting a trial judge to instruct a jury that heroin found in an accused possession imputes the knowledge to the accused that said drug was illegally imported and was known by the accused to be illegally imported is violation of the accused rights under the Sixth and Fourteenth Amendments.

To sustain a conviction under Count I of the indictment herein, the government was obliged to prove beyond a reasonable doubt that petitioner (1) knowingly sold a quantity of heroin which (2) was illegally imported into the United States and which (3) petitioner knew was illegally imported. *Turner v. United States, infra.* The only evidence elicited at trial from government witnesses was solely upon element (1) that is, the sale of the heroin by petitioner. Nowhere does the record contain any proof whatsoever that petitioner knew the heroin was illegally imported or that petitioner knew it was illegal to import heroin. For conviction it was necessary for the government

to prove all three elements of the crime to the satisfaction of the jury beyond a reasonable doubt.

Furthermore the trial judge specifically instructed the jury that possession of the narcotic alone unless unexplained to the satisfaction of the jury permitted the jury to draw the inference that the narcotic drug was imported or brought into the United States contrary to law and to draw the further inference that the accused had knowledge that the drug was imported or brought into the United States contrary to law. On page 114 of the transcript of trial, the court states as follows:

> "With respect to Count I there are three essential elements that the government must prove beyond all reasonable doubt in order to establish the guilt of the defendant as to such count.
>
> "First, that the act of selling the narcotic drug as alleged, which narcotic drug had been imported or brought into the United States contrary to law as charged; and, second, the doing of such act with knowledge, that the narcotic drug had been imported or brought into the United States contrary to law, and the doing of such act knowingly.
>
> "Now, as to Count I, if the jury should find beyond a reasonable doubt that the defendant had possession of the narcotic drug as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the narcotic drug was imported or brought into the United States contrary to law, and to draw the further inference and find that the accused had knowledge that the narcotic drug was imported or brought in contrary to law."

To refute the presumption the defendant was obliged to take the witness stand in an attempt to explain to the jury that he was innocent of the crime charged. This was

in direct violation of his right against compulsory self-incrimination under the Fifth Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, 84 S. Ct. 1489 (1964); *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S. Ct. 1602 (1966).

Since there was no evidence in the record whatsoever proving that the heroin that petitioner allegedly sold was illegally imported into this country or that petitioner knew said drug was illegally imported, the jury had no evidence before it with which they could have made a finding of fact on these points. Further the record is devoid of any evidence on these elements of the crime of which it was necessary for the government to prove beyond a reasonable doubt, therefore it is apparent that the jury either went outside of the record to make their finding or the aforementioned presumption allowed them to infer guilt of these elements.

This court has held that a statute authorizing the inference of one fact from the proof of another in criminal cases must be subjected to the highest scrutiny by the court to prevent conviction upon insufficient proof. *Tot v. United States*, 319 U.S. 463, 87 L.Ed. 1519, 63 S. Ct. 1241 (1943). In *Tot* and the line of cases following it, this court has required the invalidation of statutorily authorized inferences unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary v. United States*, 395 U.S. 6, 23 L.Ed.2d 57, 89 S. Ct. 1532 (1969).

Since it was impossible in this case to determine where the jury derived their knowledge that the defendant was

guilty beyond a reasonable doubt of elements (2 and 3 of Count I) the conviction as to this count must be reversed as it would be ridiculous to assume that without evidence introduced by the government to show the availability of heroin (which was not done in this case) that a jury could presume that a person allegedly selling heroin could further be assumed to have the knowledge that said heroin had been illegally imported into the country and that even further said individual knew that it was illegal to import heroin at all. Since the question on review is sufficiency of the evidence and since the jury might have relied heavily on the inferences authorized by the statute and included in the court's instructions the conviction of Count I must be reversed under the *Leary* rational as cited above.

As a result of the inference allowed by the statute petitioner was unable to invoke or waive his privilege against compulsory self-incrimination in the unfettered exercise of his own will. This question to the best knowledge of petitioner has not been answered by this court as the *Turner* decision did not state as to whether evidence showing the availability of heroin in the United States was presented by the government to that jury. In this case it was not and there is no evidence whatsoever in the record allowing the jury to convict beyond a reasonable doubt as to Count I.

2. Count II of the indictment charging the defendant with despensing heroin not in the original stamped package or from the original stamped package must also be reversed. This count involves the question as to whether or not the statutory presumption authorized under 26 USC Section 4704(a) stating the absence of the appropriate

tax stamps on narcotic drugs shall be *prima facie* evidence of a violation of said statute is violative of petitioner's Sixth and Fourteenth Amendment rights.

The provision of 26 USC Section 4704(a) that absence of tax-paid stamps from narcotic drugs shall be *prima facie* evidence of a violation of said subsection by the person in whose possession the drugs may be found is unconstitutional in that it discourages the exercise of the rights against compulsory self-incrimination. As a result, petitioner was unable to invoke or waive his privilege against compulsory self-incrimination in the unfettered exercise of his own will. *Malloy v. Hogan, supra,* and *Miranda v. Arizona, supra.*

Again the record is devoid as to any evidence whatsoever proving that petitioner at the time he allegedly sold the heroin to the government agent knew the drugs were not from the original stamped package as the government was required to so prove beyond a reasonable doubt in order to sustain a conviction under Count II. However, because of the statutory inference, the petitioner was deprived of his choice as to whether or not to testify and apparently felt that he must have so done in order to overcome the government's right of statutory inference. He was therefore forced to testify in the matter in direct derogation of his rights under the Sixth Amendment and the due process clause of the Fourteenth Amendment. As in Count I, the jury was allowed to go completely outside of the record in order to infer enough facts to convict the defendant beyond a reasonable doubt.

Again the present case is distinguishable from *Turner v. United States, supra* in that the *Turner* decision does not state as to whether or not the government introduced evi-

dence concerning the availability of heroin or the procedure wherein it is taxed. The record in this case, of course, is wholly devoid of any evidence concerning the taxing of heroin or in the origination of tax stamped packages and therefore the jury convicted defendant of this count by either shear speculation or on matters completely outside of the record, said matters being allowable by the statutory inference. Therefore the conviction as to Count II should be reversed.

3. The conviction of petitioner under Count IV should likewise be reversed for the same reasons as stated under argument for reversal of Counts I and II. Furthermore under *Turner v. United States, supra,* the conviction under Count IV must be reversed as in that case this court struck down the presumption portion of 26 USC 4704(a) as applied to cocaine. It is true that a sale rather than possession is involved in the instant case, however, the identical principal is involved, as the same reasoning used by the court in striking down presumption as it applies to possession must be used as applied to the sale of cocaine.

Even the Circuit Court of Appeals critized the giving of the instruction as shown in Exhibit "A". Although this case involves a sale rather than mere possession, the statutory inference allows the jury to conclude that since petitioner had possession of the cocaine he therefore knew it did not come from the original stamped package. The presumption is no different in a case applying to possession as opposed to selling and for this reason petitioner concludes that the Court of Appeals erroneously applied the *Turner* rule to their decision. Based upon the argument under Counts I and II and the *Turner* decision the con-

viction under Count IV of the indictment herein must be reversed.

4. Since Count III of the indictment was dismissed by the trial judge, and since the other counts or if this court so finds that some of them must also be reversed, the cumulative charges against the defendant so prejudiced the jury's mind against him that they were liable to convict him of any count that was placed before them. If this court believes that the conviction on all of the counts need not be reversed, the court should still grant the defendant a new trial upon the remaining counts. This would insure the defendant that he would not be prejudiced by the introduction or inference to any other drug during the course of the trial except the drug that he was being tried for. The cumulative charging of the defendant in this case with a drug which he was found to be innocent of, prejudiced the minds of the jurors into believing or possibly believing that he was guilty of wrongdoing with other drugs. Since this court could not determine the effect of the dismissed charge upon the minds of the jurors, the defendant should be entitled to a new trial upon any counts that this court upholds. *Chapman v. California*, 386 U.S. 18 (1967) 17 L.Ed.2d 705, 87 S. Ct. 824.

CONCLUSION

Petitioner contends that although on first impression this case might seem identical to the *Turner* case *supra*, petitioner believes that the constitutional arguments raised on this appeal under his questions presented, have not been resolved by the *Turner* case. As the charges in the indictment in the present case are different from those in-

volved in *Turner* and different elements of proof are applicable.

Petitioner contends that in any event he should still be entitled to a new trial upon those counts which this court deems still valid to remove any taint of prejudice from the minds of the jurors of violations of other crimes which the defendant has been proven to be innocent of but evidence of such crimes still being in the minds of the jurors that convicted him of the present charge.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ALVIN HARRISON PETERSON, *Defendant-Appellant.*	No. 25,909

[January 18, 1971]

Appeal from the United States District Court
for the Western District of Washington
Northern Division

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

PER CURIAM.

The "concurrent sentences" rule first announced in *Sinclair v. United States,* 279 U.S. 263, 299 (1929) and consistenly adhered to by the Supreme Court (*Lawn v. United States,* 355 U.S. 339, 359 (1958), *Greene v. United States,* 358 U.S. 326, 330 (1959)) makes unnecessary any examination into appellants sole assignment of error which attacks the validity of one of several convictions under a multi-count indictment.

We have nevertheless considered the assignment; granted the criticized instruction should not have been given, the conclusion is manifest that the error was harmless. *Chapman v. California,* 386 U.S. 18 (1967).

Affirmed.

EXHIBIT "A"

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1749

ALVIN HARRISON PETERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on three counts of a four-count indictment charging narcotics offenses (Pet. 3-4; Tr. 129-130).[1] Count One charged that he sold heroin with knowledge that it had been unlawfully imported (21 U.S.C. 174); Count Two, that he sold and dis-

[1] "Tr." refers to the trial transcript, a copy of which is being lodged herewith. Count Three was dismissed at trial (Tr. 88-91) and is not involved.

pensed the same heroin not in or from the original stamped package (26 U.S.C. 4704(a)); and Count Four, that he sold and dispensed cocaine not in or from the original stamped package (26 U.S.C. 4704 (a)). On January 16, 1970, petitioner was sentenced to eight years' imprisonment on Count One and five years on each of the two other counts; these three terms were made to run concurrently (Pet. 7). The court of appeals affirmed in a *per curiam* opinion (Pet. App. A).

The judgment of the court of appeals was entered on January 18, 1971, and a petition for rehearing was denied on March 22, 1971 (Pet. 2). On April 17, 1971, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari until May 21, 1971. The petition was not filed until May 26, 1971, and is thus out of time under Rule 22(2) of the Rules of this Court. In any event, no question meriting further review is presented.

On February 26, 1969, an agent of the Bureau of Narcotics and Dangerous Drugs purchased 3.271 grams of heroin and 7.126 grams of cocaine from petitioner, for $550, in a Seattle, Washington, apartment (Tr. 28-37, 43-44). The narcotics were delivered to the agent by petitioner in two aluminum foil packages, neither of which had tax stamps affixed (Tr. 31, 35). When the agent asked petitioner if he knew where the cocaine came from, petitioner responded that it came from Mexico and that the only cocaine "from the States" was synthetic (Tr. 33).

1. Petitioner was properly convicted of the heroin offense in violation of 21 U.S.C. 174, charged in

Count One. That the instructions on that count dealt with the statutory inference arising from possession (Pet. 9; Tr. 114) was entirely proper under *Turner* v. *United States*, 396 U.S. 398, 405-418.[2]

2. Petitioner's challenge to his convictions on Counts Two and Four is also without merit.

Count Two charged that petitioner did "unlawfully sell, dispense and distribute" (Pet. 3) a quantity of heroin not from the original stamped package in violation of 26 U.S.C. 4704(a). Here, as in *Turner*, "the instruction on the presumption [contained in this statute (Pet. 5-7; Tr. 115-119)] is beside the point, since even if invalid, it was harmless error; the jury must have believed the * * * evidence which in itself established a distribution barred by the statute" (396 U.S. at 421).

Count Four made the identical charge with respect to cocaine. Petitioner's reliance upon *Turner* to support his claim that conviction was improper is not well taken. The essence of the government's case, as revealed by the testimony of the agent, was that *sales* were made not in or from stamp-bearing packages

[2] Petitioner's efforts to distinguish *Turner* are without validity. The contention that the inference authorized by 21 U.S.C. 174 violates the privilege against self-incrimination (Pet. 9-10) was considered and rejected in *Turner* (396 U.S. at 418). Similarly baseless is the suggestion that *Turner* is not controlling since it does not appear from this Court's opinion in that case whether evidence showing the availability of heroin in the United States was presented by the government to the jury, while it is clear that no such evidence was introduced in this case (Pet. 11). The opinion in *Turner* makes clear, however, that no such evidence was presented (396 U.S. at 405-406).

and that the cocaine came from Mexico. The jury must have believed this testimony "since it returned a verdict of guilty" (396 U.S. at 422). Accordingly, unlike *Turner*, where the only evidence was possession, reliance upon the statutory inference was not "critical" (*id.* at 423-424).

At all events, this is clearly an appropriate case for the application of the concurrent sentence rule. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *McGee* v. *United States*, No. 362, this Term, decided May 17, 1971, slip op. 12 n. 15.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 428598 726